

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/09-01/20**

Date: **8 October 2021**

**THE PLENARY OF JUDGES OF THE INTERNATIONAL CRIMINAL COURT**

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. PAUL GICHERU***

**Public with Public Annex**

**Decision on the “Request for Leave to Reply to the Prosecution response to the Defence  
“Request for the Disqualification of Judge Miatta Maria Samba”” dated 4 October 2021  
(ICC-01/09-01/20-186-Conf) and notification of Judge Samba’s Observations**

**Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor**

Mr James Stewart  
Mr Anton Steynberg

**Counsel for the Defence**

Mr Michael G. Karnavas  
Ms Suzana Tomanović

**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants****The Office of Public Counsel for Victims****The Office of Public Counsel for the Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Section****Other**

All Judges  
Trial Chamber III

The plenary of the judges of the International Criminal Court (the ‘Court’), with the exception of Judge Miatta Maria Samba, in the case of *The Prosecutor v. Paul Gicheru*, in the context of a request for disqualification pursuant to article 41(2) of the Rome Statute, has before it the “Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”” filed on 4 October 2021 (the ‘Leave to Reply Request’),<sup>1</sup> requesting that leave be granted to reply to the response of the Office of the Prosecutor (the ‘OTP’) to the Defence Request for the Disqualification of Judge Miatta Maria Samba.<sup>2</sup>

## I. PROCEDURAL HISTORY

1. On 17 September 2021, the Defence for Mr Gicheru filed its ‘Request for the Disqualification of Judge Miatta Maria Samba’ pursuant to article 41(2)(b) of the Rome Statute (the ‘Application’) seeking that Judge Samba be disqualified from Trial Chamber III.<sup>3</sup>
2. On 22 September 2021, the Presidency filed a procedural order establishing the deadline for the receipt of any written observations of Judge Samba, pursuant to article 41(2)(c) of the Rome Statute and rule 34(2) of the Rules of Procedure and Evidence, as well as for the receipt of any response to the Application by the Office of the Prosecutor.<sup>4</sup>

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<sup>1</sup> Defence for Mr Paul Gicheru, *The Prosecutor v. Paul Gicheru*, Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”, 4 October 2021, ICC-01/09-01/20-186-Conf.

<sup>2</sup> Office of the Prosecutor, *The Prosecutor v. Paul Gicheru*, Corrected version of “Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba””, ICC-01/09-01/20-184-Conf, 29 September 2021, 1 October 2021, ICC-01/09-01/20-184-Conf-Corr (notified on 4 October 2021).

<sup>3</sup> Defence for Mr Paul Gicheru, *The Prosecutor v. Paul Gicheru*, Request for the Disqualification of Judge Miatta Maria Samba, 17 September 2021, ICC-01/09-01/20-173-Conf, pp. 3, 22, public redacted version available: ICC-01/09-01/20-173-Red (the ‘Disqualification Request’).

<sup>4</sup> Presidency, *The Prosecutor v. Paul Gicheru*, Order concerning the ‘Request for the Disqualification of Judge Miatta Maria Samba’ dated 17 September 2021 (ICC-01/09-01/20-173-Conf), 22 September 2021, ICC-01/09-01/20-178-Conf.

3. On 29 September 2021, the OTP filed its response to the Application (the ‘Prosecution Response’),<sup>5</sup> and, on 4 October 2021, a corrigendum<sup>6</sup> and public redacted version<sup>7</sup> thereof were notified.
4. On 4 October 2021, the Defence filed its present Leave to Reply Request.<sup>8</sup>
5. On 5 October 2021, Judge Samba duly transmitted her written observations on the Application to the members of the Presidency via email within the established time limit, indicating that such observations could be made publicly available. Such observations are hereby annexed to the present Decision.
6. On 5 October 2021, the OTP filed a response to the Leave to Reply Request, submitting that it should be dismissed. The OTP contends that the granting of leave to reply would not assist the plenary and further argues that the Defence has breached regulation 24(5) of the Regulations of the Court (the ‘Regulations’) by replying to the Prosecution Response in the course of its Leave to Reply Request.<sup>9</sup>

## II. MERITS

7. The Leave to Reply Request seeks leave to reply pursuant to regulations 24(5) and 34(c) of the Regulations on the basis that the OTP misrepresented ICC jurisprudence concerning recusal and disqualification, misrepresented Defence arguments, misdirects with irrelevant factors and relies on information which was not available to the Defence at the time of its Application.<sup>10</sup>

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<sup>5</sup> Office of the Prosecutor, *The Prosecutor v. Paul Gicheru*, Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”, 29 September 2021, ICC-01/09-01/20-184-Conf.

<sup>6</sup> Office of the Prosecutor, *The Prosecutor v. Paul Gicheru*, Corrected version of “Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba””, ICC-01/09-01/20-184-Conf, 29 September 2021, 1 October 2021, ICC-01/09-01/20-184-Conf-Corr (notified on 4 October 2021).

<sup>7</sup> Office of the Prosecutor, *The Prosecutor v. Paul Gicheru*, Public redacted version of “Corrected version of “Prosecution response to the Defence ‘Request for the Disqualification of Judge Miatta Maria Samba’”, ICC-01/09-01/20-184-Conf, 1 October 2021, 1 October 2021, ICC-01/09-01/20-184-Corr-Red.

<sup>8</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf.

<sup>9</sup> Office of the Prosecutor, *The Prosecutor v. Paul Gicheru*, Prosecution response to the Defence “Request for Leave to Reply to the Prosecution response to the Defence ‘Request for the Disqualification of Judge Miatta Maria Samba’”, ICC-01/09-01/20-186-Conf, 5 October 2021, ICC-01/09-01/20-188-Conf (notified on 6 October 2021).

<sup>10</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf, p. 3.

8. The plenary of judges considers that proceedings concerning a request for disqualification are *sui generis* in nature and that the plenary has considerable scope to determine the necessary procedural aspects. It further considers that the key submissions which govern the conduct of a disqualification proceeding are the request for disqualification and the observations of the Judge who is the subject of the request. Submissions from other parties or participants to the case are more peripheral in this context.
9. In respect of the first ground on which leave to reply is sought, the Leave to Reply Request submits that the OTP has misrepresented the Court's own jurisprudence concerning recusal and disqualification.<sup>11</sup> The plenary considers that it is itself ideally suited to make all necessary interpretations as to meaning of its own prior jurisprudence concerning disqualification at the Court, as well as that of the Presidency concerning excusals. Both the Defence and the OTP have had ample opportunity to present their interpretations of publicly available prior decisions of potential relevance concerning disqualification and excusal and, noting the terms of regulation 24(5) of the Regulations, there appears to be nothing contained in the OTP's Response which could not have been anticipated by the Defence. To the extent that any questions remain concerning the remit of such jurisprudence in the present circumstances the plenary is entirely capable of assessing such legal questions and would not benefit from further submissions from Mr Gicheru in this regard.
10. The second ground on which leave to reply is sought pertains to whether the OTP has misrepresented the Defence arguments that Judge Samba could have formed an opinion on the *Gicheru* case<sup>12</sup> and the third ground submits that the OTP 'misdirects by raising irrelevant factors'.<sup>13</sup> The plenary notes that the topics upon which leave to reply is sought were already addressed in detail in the Application.<sup>14</sup> Accordingly, it is evident that such information is not of the nature which could not have been reasonably anticipated. It further considers that there would be minimal value in permitting the Defence to make further submissions on this issue.

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<sup>11</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf, paras. 1-2.

<sup>12</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf, paras. 3-4.

<sup>13</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf, paras. 5-6.

<sup>14</sup> Application, ICC-01/09-01/20-173-Conf, paras. 31-37, 47-48.

11. The fourth ground on which leave to reply is sought alleges that the OTP response to the Application relies on information which was not available to the Defence at the time of its request.<sup>15</sup> The plenary considers that the question of the adequacy and stage of the OTP disclosure concerning the Judge's prior role at the OTP is not at the core of the present disqualification request and sees little value to the disqualification proceedings in receiving further submissions on this issue.

The plenary of the judges hereby denies the Leave to Reply Request.

Done in both English and French, the English version being authoritative.



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**Judge Piotr Hofmański**  
**President**

Dated this 8 October 2021

At The Hague, The Netherlands

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<sup>15</sup> Leave to Reply Request, ICC-01/09-01/20-186-Conf, paras. 7-8.